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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KENNETH E. BOUSLEY

v.

JOSEPH M. BROOKS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

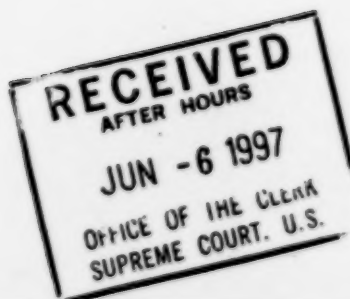
BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, who entered a guilty plea to a charge of using a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. 924(c), may move pursuant to 28 U.S.C. 2255 to vacate his conviction in light of Bailey v. United States, 116 S. Ct. 501 (1995), even though he did not challenge the factual basis for his plea on direct appeal.

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 97 F.3d 284 (1996).

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on December 18, 1996. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was convicted of

possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced to 78 months' imprisonment on the drug offense and a consecutive term of 60 months' imprisonment on the Section 924(c) charge. Petitioner appealed his sentence and the court of appeals affirmed. United States v. Bousley, 950 F.2d 727 (8th Cir. 1991) (Table).

Petitioner then filed a motion under 28 U.S.C. 2255, challenging the factual basis underlying his plea to the Section 924(c) charge.¹ The district court dismissed the petition, and the court of appeals affirmed. Pet. App. 1-6.

1. On March 19, 1990, police officers executed a search warrant at petitioner's house in Minneapolis, Minnesota. The officers found two coolers in the garage. Inside the coolers were two briefcases containing 3,153 grams of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in petitioner's bedroom. Pet. App. 1.

Petitioner was charged in a superseding indictment with possession of methamphetamine with intent to distribute it, in

¹ Although petitioner styled his pleading as a petition for habeas corpus and named Joseph M. Brooks, the warden of the prison where he is incarcerated, as the defendant, the district court treated the petition as a motion under Section 2255.

violation of 21 U.S.C. 841(1)(a), and use of a firearm during and in relation to a drug offense, in violation of 18 U.S.C. 924(c). He entered a plea of guilty to both charges pursuant to a plea agreement that permitted him to challenge the amount of drugs used to determine his sentence. Pet. App. 2.

Petitioner's plea agreement contained the following stipulation regarding the factual basis for the plea:

The parties also agree that, on or about March 19, 1990 * * * the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [petitioner's] bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [petitioner] admits ownership and possession of these two guns.

Pet. C.A. Br. at A-7.

At the change of plea hearing, the district court asked petitioner what Count 2 charged him with, and petitioner responded that he had been charged with "possession of a firearm." Petitioner admitted to possession of two firearms that were seized from his bedroom and agreed that these guns were in close proximity to the 6.9 grams of methamphetamine (which he contended was for personal use). Petitioner denied that he kept the guns in his bedroom in order to assist in a drug deal, but acknowledged that they were "available" if he needed a firearm during his sales of illegal drugs. Tr. 6/15/90 Plea Hearing at 13-16.

Following an evidentiary hearing, the district court

determined that petitioner's sentence should be based on the 946.9 grams of methamphetamine found in his bedroom, in the coffee can, and in one of the two briefcases in the garage. On November 2, 1990, petitioner was sentenced to 78 months' imprisonment on the drug offense, and a consecutive term of 60 months' imprisonment on the Section 924(c) charge, to be followed by four years' supervised release.

2. Petitioner appealed from his sentence, contending that the district court had erred in determining the amount of methamphetamine for which he should be held accountable.

Petitioner did not challenge the factual basis for his plea to the Section 924(c) charge. The court of appeals affirmed.

United States v. Bousley, 950 F.2d 727 (8th Cir. 1991) (Table).

3. On July 5, 1994, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his plea of guilty to the Section 924(c) charge was not supported by an adequate factual basis under Fed. R. Crim. P. 11(f) because he had not "used" the guns in his bedroom. Pet. C.A. Br. at A13-A16. A United States Magistrate Judge recommended that petitioner's pleading be dismissed. The Magistrate Judge's report concluded that there was a factual basis for petitioner's plea because the guns in his bedroom were in close proximity to drugs and were readily accessible. Id. at A2-A12. The district court adopted the Magistrate Judge's report and recommendation on May 18, 1995, and ordered that the petition be dismissed. Id. at A1.

4. Petitioner appealed. While his appeal was pending, this Court held, in Bailey v. United States, 116 S. Ct. 501 (1995), that the conviction of a defendant for use of a firearm under Section 924(c) "requires evidence sufficient to show an active employment of the firearm by the defendant." 116 S. Ct. at 505. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. Id. at 508. By contrast, possession of a firearm -- without more -- does not constitute a "use," nor does "placement of a firearm to provide a sense of security or to embolden[.]" Ibid.

5. After Bailey was decided, the court of appeals appointed counsel to represent petitioner. Petitioner's attorney filed a supplemental brief arguing that petitioner's guilty plea should be vacated in light of Bailey. The court of appeals affirmed the district court's order dismissing petitioner's motion. Pet. App. 1-6. The court of appeals began by noting that petitioner had failed to challenge the factual basis for his Section 924(c) plea on his direct appeal. As a result, the court of appeals concluded, "[a]bsent a showing a cause and prejudice, Bousley may not now bring [this] claim[] through collateral attack." Id. at 3.

The court of appeals rejected petitioner's claim that his procedural default should be excused because neither he nor his counsel could have foreseen the Bailey decision. Citing United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), vacated and

remanded, No. 96-6348 (May 19, 1997), the court concluded that "Bailey does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." Id. at 3.

Nor, the court concluded, did petitioner's guilty plea excuse his procedural default. The court reasoned that "a defendant who enters a guilty plea with no conditions as to guilt 'waives all challenges to the prosecution of his or her case except for those related to jurisdiction.'" Id. at 3. The court noted that "a plea agreement is a process of negotiation and concession," and it declined to "allow this process to be undone years after the fact." Id. at 4. Accordingly, the court determined that "procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial." Ibid. Because the court found "no indication that petitioner's plea was involuntary or uninformed," it concluded that "he has waived his right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice." Id. at 5 (citation omitted).

The court rejected petitioner's claim that his default should be excused because he received ineffective assistance of counsel during his plea and sentencing. In particular, the court concluded that petitioner's counsel did not act unreasonably in advising petitioner not to appeal from his Section 924(c) conviction, given counsel's understanding of the interpretation of Section 924(c) before Bailey. Accordingly, the court concluded that petitioner "has waived his right to collateral

review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal." Id. at 5-6.

DISCUSSION

Petitioner contends that the court of appeals erred in concluding that he has "waived" his right to challenge his conviction under Section 924(c) in light of Bailey. Pet. 7-9. In our view, although the court of appeals properly held that petitioner could not show cause and prejudice for failing to raise his claim before final judgment was entered on his guilty plea, the court erred in suggesting that his guilty plea waived his right to seek collateral review and in failing to inquire whether petitioner should be excused from showing cause and prejudice because he has made a colorable showing of "actual innocence." Accordingly, the judgment of the court of appeals should be vacated and the case remanded for further proceedings on that question.

1. The court of appeals stated that petitioner's claim was barred at least in part because he had entered a guilty plea. Pet. App. 2-6. It is well established that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." United States v. Broce, 488 U.S. 563, 569 (1989). A defendant who pleads guilty "is convicted on his counseled admission in open court that he committed the crime charged against him." McMann v. Richardson, 397 U.S. 759, 773

(1970); see also Libretti v. United States, 116 S. Ct. 356, 362 (1995) (plea of guilty constitutes "a defendant's admission of guilt of a substantive criminal offense as charged in an indictment"); Tollett v. Henderson, 411 U.S. 258, 267 (1973) (guilty plea constitutes "admi[ssion] in open court that [defendant] is in fact guilty of the offense with which he is charged").

In light of those principles, the scope of review available on a post-conviction motion under 28 U.S.C. 2255 challenging a conviction entered on a guilty plea is narrow:

[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

Broce, 488 U.S. at 569; see also Tollett v. Henderson, 411 U.S. at 266 ("The focus of federal habeas inquiry is the nature of the advice [of counsel] and the voluntariness of the plea.").

Petitioner, however, contends that his guilty plea was involuntary. See Appellant's Supplemental C.A. Br. 5. As this Court has noted, a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969). A guilty plea that is entered without adequate notice of the elements of the offense may therefore be challenged on a collateral attack. Henderson v. Morgan, 426 U.S. 637, 644 (1976).

Ordinarily, it is appropriate to presume that defense

counsel has explained the nature of the offense in sufficient detail to give the defendant notice of what he is being asked to admit. Henderson, 426 U.S. at 647; Marshall v. Lonberger, 459 U.S. 422, 436 (1983). Here, however, the transcript of the plea hearing shows that petitioner incorrectly believed that he could be convicted under Section 924(c) based solely on "possession" of a weapon. See p. 3, supra. That understanding was consistent with Eighth Circuit law before Bailey, and neither the court nor the prosecution said anything to disabuse petitioner of the view that possession of the firearm was illicit. As a result, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Tollett, 426 U.S. at 644. Accordingly, assuming that petitioner can overcome his procedural default, petitioner may challenge his conviction on collateral attack notwithstanding his guilty plea.²

2. A defendant who brings a collateral challenge to his conviction on grounds not raised on direct appeal must ordinarily show both "cause" excusing his procedural default and "actual

² Two courts of appeals have held that a guilty plea never bars a Bailey challenge to a Section 924(c) count on collateral attack. See United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996); Lee v. United States, 1997 WL 213972 at *2-*3 (7th Cir. Apr. 30, 1997). In addition to those cases, numerous courts of appeal have allowed post-Bailey challenges to Section 924(c) convictions on direct appeal following a guilty plea. See, e.g., United States v. Cruz-Rojas, 101 F.3d 283, 285-86 (2d Cir. 1996); United States v. Mitchell, 104 F.3d 649, 652 & n.2 (4th Cir. 1997); United States v. Andrade, 83 F.3d 729, 730-731 (5th Cir. 1996); United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997); United States v. Staples, 85 F.3d 461 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996).

prejudice" resulting from the error of which he complains. United States v. Frady, 456 U.S. 152, 168 (1982). The court of appeals correctly concluded that petitioner had failed to demonstrate cause for his procedural default. In a narrow class of cases, however, a defendant's procedural default does not bar his opportunity to raise a claim on a collateral challenge.³

This Court has held that even a defendant who is unable to show cause and prejudice may obtain "collateral review of his constitutional claims * * * if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Schlup v. Delo, 115 S. Ct. 851, 861 (1995). A defendant may show that his is the "extraordinary case," *id.* at 864, that falls within that class by showing that a constitutional error "has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986).⁴ See also Schlup, 116 S. Ct. at 865.

The court of appeals erred by failing to consider whether petitioner had made a sufficient showing of actual innocence to warrant reaching the merits of his constitutional claim, notwithstanding his failure to show cause and prejudice. See

³ Other procedural rules governing collateral challenges may, however, still bar a defendant's claim. See, e.g., 28 U.S.C. 2255 (imposing 1-year statute of limitations on Section 2255 motions and limiting second or successive Section 2255 motions).

⁴ Although petitioner did not expressly argue that his claim of innocence excused a showing of cause, his *pro se* brief on appeal both raised a claim of innocence and cited to Murray v. Carrier, 477 U.S. 478 (1986). See Pet. C.A. Br. at 2.

Pet. App. 3 (procedural default excused "only if" prisoner can show cause and prejudice). To satisfy that showing, petitioner must show not only that the guilty plea proceedings were defective, but he also must carry the burden of pointing to evidence already in the record -- or introducing new evidence if necessary -- that demonstrates that he is actually innocent of the offense of conviction.⁵ Cf. Schlup, 115 S. Ct. at 867. The judgment of the court of appeals should therefore be vacated and the case should be remanded for further proceedings to determine whether the "actual innocence" standard is satisfied. Because the question whether petitioner has carried his burden has a large factual component, see Schlup, 115 S. Ct. at 868-869, the court of appeals may wish to remand this case for resolution of the "actual innocence" issue in the first instance by the district court.⁶

⁵ As noted above, see note 2, *supra*, two circuits have held that a guilty plea does not bar a defendant from mounting a collateral attack on his Section 924(c) conviction under Bailey. Insofar as those cases stand for the proposition that a guilty plea does not necessarily bar a collateral attack on a Section 924(c) conviction under Bailey, they are correct and consistent with the analysis in this Brief. Insofar as they are read to hold, however, that a defendant is automatically excused from a failure to show cause and prejudice when he brings a Bailey-based collateral attack on his conviction, in our view they are incorrect; to overcome a failure to show cause for a procedural default, a prisoner bringing a Bailey claim -- like a prisoner bringing any other claim -- must show that a miscarriage of justice would result by failing to consider the defaulted claim.

⁶ Petitioner suggests (Pet. i, 7) that certiorari is warranted "to resolve the conflict between circuits regarding the retroactive application of Bailey." The decision below does not address the "retroactivity" of Bailey, however, and there is no conflict among the circuits on that issue. See Pet. App. 4 ("[t]he retroactive effect of Bailey is a distinct issue from

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further proceedings to determine whether petitioner should be excused from his inability to show cause and prejudice for his failure to advance his constitutional claim on direct review.

Respectfully submitted.

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JUNE 1997

whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal.").